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No. 80-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

REPLY BRIEF

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REPLY BRIEF

This Reply Brief is submitted pursuant to Rule 22.5, Rules of the United States Supreme Court, to address arguments first raised in the Brief of Respondents in opposition to the Petition for Writ of Certiorari submitted by Petitioners in this matter.

ARGUMENT

I. THE EN BANC DECISION IN DAVIS v. PAGE IS DIRECTLY CONTRARY TO THE LATER OPINION OF THIS COURT IN LASSITER v. DIVISION OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA, ___U.S.___, 68 L.Ed.2d 640, 101 S.Ct. ___(June 1, 1981) AND SHOULD BE ACCORDINGLY REMANDED TO THE FIFTH CIRCUIT IN LIGHT OF THE LASSITER OPINION.

In their Brief in Opposition to the Petition for Certiorari filed herein, Respondents recognize the significance of this Court's decision in Lassiter v. Division of Social Services, supra, which decision was issued after the filing of the Petition for Certiorari, but, it is submitted, are totally in error in their analysis of the impact which it has on the en banc decision which is the subject of the Petition.

The Fifth Circuit, en banc, held, with regard to the right to counsel for indigent parents in Florida dependency proceedings:

> . . . In our view of the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and should not be subject to the discretion of trial judge. We thus hold that in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made.[1/]

This appears directly contrary to the determination of this Court that trial courts are the proper courts to make the

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1/ Thus, initially every custody proceeding, except "emergency" proceedings are included in the decision of the Fifth Circuit. Indeed, unless the trial court can be certain that custody by the state will not be prolonged or indefinite, the mandate applies.

initial determination of the need for counsel on a case-by-case basis:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," Gagnon v. Scarpelli, supra, 411 US at 788, 36 L Ed 2d 656, 93 S Ct 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., Wood v. Georgia, ___ US ___, 67 L Ed 2d 220, 101 S Ct 1097.

Respondents remarkably argue that the en banc Davis decision anticipates

and conforms to Lassiter,[1] in spite of the fact that Lassiter defers the decision on the need for counsel even in permanent custody proceedings, initially to the trial court on a case-by-case basis, while Davis specifically indicates that such a determination "should not be subject to the discretion of the trial judge." The conflict of the opinions is obvious and irreconcilable.

Florida already provides an absolute right to counsel in permanent loss of custody proceedings, In the Interest of D.B. & D.S., 385 So.2d 82 (Fla. 1980), so only something less severe than the situation in Lassiter exists in Florida and, as the Court has recognized, the trial courts can

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1/ Petitioner equally remarkably asserts that the parent's interest in the Florida proceeding is significantly greater than the interest at stake in Lassiter, in spite of the fact that Lassiter involved permanent loss of custody, while, at the most, Davis involved temporary, though possibly indefinite or prolonged loss of custody.

best address the need to counsel in matters before them and where in error, the appellate courts can correct the error.

Respondent finally addresses the various criteria for determining the need to counsel. This, however, begs the issue of whether these may be properly examined by the trial court on a case-by-case basis, per Lassiter, or are made irrelevant by an absolute determination that a right to counsel exists in all by the most temporary emergency situation, per Davis.

This Court having spoken on the issue, and its guidance being now available to the Fifth Circuit, it is respectfully submitted that this case should be remanded to the Fifth Circuit to act in accordance with the Lassiter decision.

II. THE DOCTRINE OF ABSTENTION IS AN INTEGRAL PART OF THE ARGUMENT MADE BY PETITIONER THAT

THE COURT SHOULD NOT TAKE JURISDICTION OF THIS MATTER PURSUANT TO THE WRIT OF HABEAS CORPUS AND IS EXPRESSLY SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI.

Respondents assert that the abstention argument, founded on concepts of federalism, has been abandoned by Petitioners. On the contrary, Petitioners assert in their Petition, as a part of the argument that Habeas Corpus does not jurisdictionally lie as a remedy:[1/]

> . . . The awesome power of the writ to avoid res judicata and its implications for federalism, demand that its use be confined to its proper role; the preservation of individual liberty and the relief from unlawful custody.

1/ While this issue is clearly part and parcel of Petitioner's argument, the issue of abstention may, of course, be raised by a court sua sponte, See Bellotti v. Baird, 428 U.S. 132 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976), n. 10, pgs. 853-54; Naylor v. Case & McGrath, Inc., 585 F.2d 557, 567 (2d Cir. 1978); BT Ins. Managers, Inc. v. Lewis, 559 F.2d 950 (5th Cir. 1977).

This is highlighted by the comments of Judge Brown in his dissent in this case:

> Once again this Court in the high name of the Constitution becomes involved by the majority in the most direct way in domestic problems wisely left to the states. Not only that, it is done by an order declaring unconstitutional prior decisions of the state's highest tribunal through the medium of an attack directed against innocent local state trial circuit judges, all of whom--including all other judges high and low in the whole state of Florida--are not categorically directed, without discretion or consideration of real needs, to conform to our edict. I think all of the principles of Federalism and the demands of comity are defeated by this action and I therefore dissent from this intrusion
>
> Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980) (dissenting opinion)[1/]

It is precisely the extension of the abstention doctrine emerging from the court's opinion in Younger v. Harris, 401

1/ Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit, pp. 10-11, Chastain v. Davis, Case No. 80-1888, Supreme Court of the United States.

U. S. 37, 91 S.Ct. 746, 77 L.Ed.2d 669 (1971), to matters involving child custody, Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), which is the substantive basis for that discussion.

The doctrine of abstention finds its roots in equity. The United States Supreme Court in Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, observed that the issues before it involved "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." Id. at 312 U.S. 496. In the case now before this court, several alternatives, already discussed, supra, were available to Mrs. Davis, both in the state courts and in the United States Supreme Court. Further, that the area of domestic relations is one generally reserved to the states is well-established in this country. Sosna v. State of Iowa, 419 U.S. 393, 404, 95 S.Ct. 553,

559, 42 L.Ed.2d 532, 543 (1975); DeSylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 979, 100 L.Ed. 1415, 1426 (1956). The holding of the Pullman court created the doctrine that a federal court should not hear matters relating to the constitutionality of state statutes prior to an opportunity being afforded a state court to interpret the state statute attacked.

In Younger v. Harris, supra, the Supreme Court expanded the doctrine of abstention to prohibit federal court interference in state criminal proceedings by way of injunction. The doctrine was also expanded to include interference by way of declaratory relief. Samuel v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). The court in Younger noted that the original notions of equity upon which abstention were founded were "reinforced by an even more vital consideration, the notion of comity," ". . .

that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 401 U.S. 44. The intermeshed doctrines of comity and abstention form the basis for the concept known as federalism. Id. To permit habeas relief in this context would be to avoid the very concerns which are the foundation of abstention.

The abstention doctrine, even as expanded in Younger, concerned itself with federal intervention in pending state proceedings. While it might be asserted that the denial of Mrs. Davis' petition for habeas by the Florida Supreme Court concluded all proceedings, a closer review of the facts of this case demonstrate that the contrary is true. While no particular petition was before the circuit court at the time Mrs. Davis filed her federal

action, the jurisdiction of the circuit court had been invoked and was continuing. That Mrs. Davis' counsel withheld the filing of her petition in the state circuit court until after he had filed her petition in the federal court should not result in an avoidance of the abstention doctrine.[1/]

From the time of the 1971 decision in Younger, supra, the Supreme Court has expressed a strong concern for avoidance

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1/ Further, with regard to the question of the existence of an ongoing state proceeding, Petitioner would point out two facts. First of all, Respondent Davis was involved in a proceeding involving the continuing jurisdiction of the state court pursuant to Chapter 39, and secondly, the action was a class action, including all indigents in the Dade County Court who "have been or may be" defendants in like proceedings. Clearly, this resulted in direct involvement in ongoing court proceedings of class members, who were every bit as much plaintiffs as Davis from the time of certification. In fact, the case of In the Interest of D.B. & D.S., supra, where the State Supreme Court rejected the rationale of Davis v. Page was just such a case, originating in the 11th Judicial Circuit contemporaneously with Davis v. Page.

of interference by the federal judiciary with state court proceedings. This policy of self-restraint extends to both civil and criminal proceedings, and should be applied here. In this case the Respondent had ample opportunity to present her federal constitutional claims in state proceedings; there is no suggestion of bad faith conduct or harassment of Respondent by the state judiciary; nor was the procedure challenged wholly and flagrantly violative of express constitutional prohibitions. In fact, the only federal appellate expression, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1975), was followed by the State of Florida.

The considerations of comity and judicial restraint are bolstered by the recognition of the federal courts that domestic relations is an area of law in which federal courts have traditionally deferred to state courts. Combining this with the federal challenge to the competence of the state

judiciary to determine when counsel is required and with the actual and direct conflict created in this case by state court judges being subject to directives from two putative masters, the policy of restraint is all the more urgently before this Court.[1/] Justice Rhenquist quite clearly enunciated this concern in Huffman v. Pursue,Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975):

> The seriousness of federal judicial interference with state civil functions has long been

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1/ Indeed the concern of the Florida Supreme Court is made clear by the following discussion from In the Interest of D.B. & D.S., supra:

> Abstention Doctrine
>
> We find it necessary to address the federal abstention doctrine because our views expressed in this opinion do not conform to the decision of the United States District Court in Davis v. Page. The right to counsel in juvenile dependency proceeding has not been addressed by the United States Supreme Court. Further, only one federal appellate court, the Ninth Circuit in Cleaver v. Wilcox, has written on the issue, and we have adhered to their view.
>
> The United States Supreme Court has expressly developed a policy of self-restraint

> recognized by this court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. . . .

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directing the federal judiciary to avoid interference with state court proceedings and accept jurisdiction only when (a) the claimants have no opportunity to present their federal constitutional claims in state proceedings, or (b) there is bad faith conduct by the state, or (c) the challenged state statute is wholly and flagrantly violative of express constitutional prohibitions, in whatever manner and against whomever an effort might be made to apply it. Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The instant facts do not warrant federal intervention, particularly in light of the recent decision in Moore v. Sims. In Sims the United States Supreme Court reversed a federal intervention declaring unconstitutional the statutory deheme for child abuse proceedings in Texas, including the participants' right to counsel. The Court said: "Certainly, abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." 442 U.S. at 425-26, 99 S.Ct. at 2378.

The application of the abstension doctrine does not preclude judicial

> Although Mr. Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings we think that the relevant considerations of federalism are of no less weight

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consideration of an alleged constituional right; rather, it directs that a proceeding affecting state statutes or a state judicial procedure be resolved first in the state courts, absent bad faith by the state or the lack of a state forum or procedure with which to consider the particular contention. In both the instant case and Davis, there was a direct avenue in the state juvenile dependency proceeding to raise the claim of a constitutional right to counsel. Appellees could have appealed an adverse finding from either a nonfinal order, see Florida Rule of Appellate Procedure 9.100, or a final judgment direct to the Supreme Court of Florida. Art. V, §3(b)(1), Fla.Const.

Florida courts have historically sought cooperation rather than confrontation with the federal judiciary. This is illustrated by the fact that we were the first state to establish a certification process by which a federal appellate court could certify a question of state law to the Supreme Court of Florida. §25.031, Fla.Stat. (1979); Fla.R.App.P. 9.510. In this instance, however, we decline to defer to the decision of the United States District Court in Davis v. Page.

385 So.2d 82 at 93-94.

> in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies, Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles." . . .

Finally, the use of Respondent of federal habeas as a vehicle to come before the federal courts is severely challenged by the First Circuit in Sylvander v. New England Home for Little Wanderers, 584 F.2d 1102 (1st Cir. 1978). As pointed out there, the welfare of the child is primarily the concern of the state and one in which the primary expertise lies with judges of the state family courts. Furthermore, it is in no way a confinement or custodial detention situation. The decision recognizes the substantial intrusion into federal-state relations resulting from

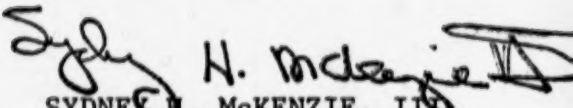
federal habeas actions. The considerations in this particular case magnify that situation, confirm the concerns of that opinion, and add substantially to the rationale for this court to follow that decision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant the Petition for Certiorari.

Respectfully submitted

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF has been furnished, by U. S. Mail, to MICHAEL R. MASINTER, ESQUIRE, Counsel of Record for Respondents, 7455 S.W. 82nd Court, Miami, Florida 33143 and CHESTER G. SENF, ESQUIRE, Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301, this 13th day of August, 1981.

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